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In the Supreme Court of the United States

OCTOBER TERM, 1975

MARTIN STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of (1) conspiring with a named individual to obstruct and defeat the functions of the Internal Revenue Service in the assessment and collection of income taxes, in violation of 18 U.S.C. 371; (2) willfully attempting to evade and defeat his individual income tax for the year 1970, in violation of 26 U.S.C. 7201; and (3) willfully failing

to file an income tax return for 1970, in violation of 26 U.S.C. 7203. Petitioner was fined $2,500 on each count and sentenced to prison terms totalling four years (R. 250).[1] The court of appeals affirmed (Pet. App. A1-A10). Petitioner contends that he was denied the effective assistance of counsel, that the government should have called the district court's attention before trial to his mental capacity, and that there was an inadequate inquiry into whether he wished to waive trial by jury.

As the court of appeals stated (Pet. App. 2), the evidence showed that petitioner, a former Internal Revenue Service agent, started a business in 1970 to bootleg tape recordings of musical hits. He solicited orders by telephone and ran the business on a cash basis with a bank account kept under a fictitious name. The 20 to 50 employees were paid in cash and did not complete withholding tax forms but were told that the taxes were "taken care of." A government expert computed Stern's taxable income for 1970, the year he failed to file a return, at $381,-026.50.

The pertinent facts relating to petitioner's contentions are as follows: Two weeks after his conviction petitioner filed a motion for a new trial, supported by affidavits purporting to show that he was incapable of forming the specific intent to commit the offenses or of adequately cooperating in his own defense. He was then represented by an attorney other than his

[1] "R." refers to the Clerk's Record (Pleadings) on appeal. "Tr." refers to the trial transcript.

counsel at trial. The government responded with a request for a court-ordered psychiatric examination, which was granted. Petitioner then filed an affidavit from a psychiatrist who first saw him after conviction and before sentencing stating that petitioner was a schizophrenic who lacked substantial capacity to conform his conduct to the requirements of the law. A psychotherapist who had treated petitioner for more than two years agreed with that assessment. Petitioner filed an affidavit stating that his trial counsel, Bruce Hochman, was negligent and incompetent in failing to explore a possible "psychiatric defense" (Pet. App. A2-A3).

The court-appointed psychiatrist concluded that (1) petitioner was presently able to understand the proceedings against him and to cooperate and assist in his own defense; (2) petitioner was able to understand the proceedings against him from January 1, 1974 (shortly after indictment), to the time of the report, and able to cooperate rationally with counsel in his own defense during that time; and (3) petitioner, even though suffering from schizophrenia, did not lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform it to the requirements of the law at the time of the commission of the charged offenses (Pet. App. A3-A4).

At the hearing on petitioner's motion for a new trial, he argued that his trial counsel had erred in not making an inquiry into petitioner's psychiatric background (Tr. 579). Petitioner's trial counsel, Bruce Hochman, testified that before trial he had discussed

with petitioner the possibility of a "diminished capacity" defense (Tr. 609-610), but that he had decided not to utilize this as a defense because he "believed it would have been counter-productive" (Tr. 610). Hochman decided to defend on the basis of petitioner's alleged reliance on the professional advice of his former tax lawyer and accountant, Herbert Sturman (Pet. App. A4). After this defense was raised prior to trial, the prosecution gave serious consideration to recommending a misdemeanor disposition in return for a guilty plea (*ibid.*).

In denying the motion for a new trial, the trial court stated (Tr. 651-652):

> I have given a great deal of thought to the manner in which this case was tried and the adequacy of the representation given by Mr. Hochman to this defendant. And I see no basis whatsoever for the granting of the motion that is before this Court.
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> * * * * *
>
> I am convinced that if there was evidence of a mental condition on the part of this defendant, that Mr. Hochman was aware of it and took those steps that an adequate and a competent defense lawyer would take in considering that as a defense, and if it was at all substantial, he not only was aware of it, but must have given it his consideration in his overall plans for arranging the defense of this defendant. It could indeed be said to be a matter of tactics on the part of skilled counsel, and I don't think that the defendant should be allowed to come into court after

he has been found guilty and have a second trial simply because he wants now to take another tactical step.

There is no evidence that the defendant was legally insane at the time of the commission of the offense or at the time of the trial, or that he was incompetent to cooperate with his counsel at the trial.

I have called upon my own recollection of the manner in which this case was tried, and I am convinced that the defendant was well aware of the nature of the proceedings, was competent to cooperate with his counsel, and did indeed cooperate with his counsel, and that he was given a fair trial. I see no misconduct on the part of the Government or of defense counsel.

1. Petitioner contends (Pet. 18-28) that his conviction should be set aside because his trial counsel's failure to investigate a psychiatric defense denied him the effective assistance of counsel. Petitioner and his trial counsel conferred approximately 15 or 20 times before trial (Tr. 610), and on at least two occasions they discussed the advisability of a defense based upon petitioner's mental condition (Tr. 608-610). However, the conclusion of petitioner's trial counsel that an insanity defense would have had little chance of success is supported by the fact that petitioner had used fictitious names and addresses (see Tr. 57, 80, 184-186, 227-228).

Moreover, such a defense would have been inconsistent with one of the defenses used at trial, *viz.*, that petitioner was aware of his duty to pay taxes and that he consulted his tax lawyer early in 1971

for advice as to how he could comply with this duty (Tr. 332-333, 336, 444-446, 564-565). The defense of lack of criminal intent would have lost much of its force if combined with an insanity defense. Cf. *United States* v. *Carlson*, 423 F.2d 431, 435 (C.A. 9), certiorari denied, 400 U.S. 847. Finally, petitioner's trial counsel may well have considered the incongruity of advancing an insanity defense on behalf of a defendant who was shown to have earned over $380,000 in one year (Tr. 295-296, 323). The fact that the defense employed was not successful does not establish that petitioner did not receive the effective assistance of competent counsel.[2]

Finally, there is no merit in petitioner's argument (Pet. 18-28) that there is a conflict between the standard employed by the court of appeals for ascertaining whether he was denied the effective assistance of counsel, and that of this Court and the other courts of appeals. Here, the court of appeals stated that it would not reverse a conviction "unless a defendant's representation has been so inadequate as to make his trial a farce, sham, or mockery of justice" (Pet. App. A6). But the only foundation for petitioner's claim

[2] As the court of appeals pointed out, during the hearings on the motion for new trial, the district court described petitioner's trial counsel as "perhaps one of the best tax lawyers handling criminal cases in Los Angeles County" (Pet. App. A3). He was therefore not likely to have overlooked a meritorious available defense. Moreover, when the question of petitioner's mental competency was finally raised, the district court found that there was "no evidence that the defendant was legally insane at the time of the commission of the offense or at the time of the trial" (Tr. 652).

that he did not receive the effective assistance of competent counsel is that his trial counsel rejected the psychiatric defense which he might have used. That decision was one of conscious and informed choice by an experienced lawyer, and under all standards employed by the courts, petitioner received the effective assistance of competent counsel.

2. Petitioner further argues (Pet. 29-31) that the prosecutor was required to advise the court prior to trial of his knowledge concerning petitioner's psychiatric history in order that an inquiry would be commenced under 18 U.S.C. 4244 as to whether petitioner was competent to assist in his own defense. However, under 18 U.S.C. 4244, the prosecutor is required to file a motion only when he "has reasonable cause to believe that a person charged with an offense * * * may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense."

Here, the only knowledge concerning petitioner's psychiatric history which the government attorneys had was either imparted to them by petitioner's counsel (Tr. 634-637, 639-640, 643-645) or imparted to them in the presence of his counsel (R. 180). The prosecutors were justified in assuming that if there was any question as to petitioner's ability to assist in his own defense, defense counsel would either take action or request the government to take action leading to a judicial determination. In these circumstances, the trial court correctly concluded that there

was "no misconduct on the part of the Government" (Tr. 652).

3. Finally, petitioner argues (Pet. 32-35) that the failure of defense counsel and government counsel resulted in an inadequate inquiry into the voluntariness of his waiver of trial by jury. However, there was a written waiver of trial by jury, concurred in by the defense, the court, and the prosecution. Under these circumstances, the requirements of Rule 23(a) of the Federal Rules of Criminal Procedure are fully met without any further inquiry. *United States* v. *Hunt*, 413 F.2d 983, 984 (C.A. 4). Moreover, out of an abundance of caution, the court addressed petitioner and ascertained that he understood that he was entitled to a jury trial and that he personally waived that right (Tr. 14). There can accordingly be no doubt as to the voluntariness of petitioner's waiver of a jury trial.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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